IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

vs.

ALFRED H. MAYER COMPANY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CITY OF KANSAS CITY, STATE OF MISSOURI, AND THE CITY OF KANSAS CITY, STATE OF KANSAS, AS AMICI CURIAE

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OPINIONS BELOW

The judgment of the Circuit Court of Appeals (Ptrs'. App. 42a) was entered on June 26, 1967, and its opinion (Ptrs'. App. 43a is reported at 379 F. 2d 33. The order of the United States District Court for the Eastern District of

Missouri dismissing petitioners' first amended complaint (Ptrs'. App. 43a) is reported at 379 F. 2d 33. The order of entered May 18, 1966 and its memorandum opinion (Ptrs'. App. 15a) is reported at 225 F. Supp. 115.

JURISDICTION

On December 4, 1967 this Court granted petitioners' petition for writ of certiorari to the court of appeals, and the jurisdiction of this Court is vested pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution

The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

The Fourteenth Amendment provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutes

Section 1978 of the Revised Statutes (42 U.S.C. 1982) provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

QUESTIONS PRESENTED

1. Whether Section 1978 of the Revised Statutes prohibits developers of a large suburban residential community from refusing to sell homes therein to Negroes solely by reason of their race or color.

2. Whether such a general policy of discrimination solely on the basis of race or color followed in the development of and the sale of homes in residential subdivisions falls within the prohibitive scope of and therefore violates the Fourteenth Amendment.

3. Whether such racially discriminatory policies and the establishment of racially segregated communities are prohibited by and therefore violate the Thirteenth Amendment.

STATEMENT OF THE CASE

The Court issued its writ of certiorari to the Court of Appeals for the Eighth Circuit, which court affirmed (Ptrs'. App. 42) the district court in sustaining (Ptrs'. App. 14) the respondents' motion to dismiss the petition which alleged unlawful and unconstitutional discrimination

against the petitioners by refusing to sell them a home in the suburban community of Paddock Woods in St. Louis County, Missouri (Ptrs'. App. 3-13). The district court in taking such action held the discriminatory policy of respondents to be merely private discrimination by persons and corporations engaged in a purely private and local enterprise, and which discrimination was not therefore proscribed by either the 14th Amendment or Section 1978 of the Revised Statutes (42 U.S.C. 1982) (Ptrs'. App. 18-41).

Without further repetition of the facts, amici would adopt the statements of the case as set forth in the brief for petitioners at pages 5-8 and the brief filed herein on behalf of the United States as amicus curiae at pages 3-6.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the City of Kansas City of the State of Missouri, and the City of Kansas City of the State of Kansas, which are political subdivisions of the states within which they are located, and as such, possess broad and exclusive police power, and are charged with the grave responsibility of promoting the health and safety, morals, prosperity, property and general welfare of their inhabitants.

The City of Kansas City, Missouri is a municipal corporation of the state organized under a constitutional charter adopted in 1925 pursuant to authority granted by the Constitution of the State of Missouri and pursuant to which it possesses broad and exclusive home rule powers.[1]

1. City of Kansas City, Missouri, adopted its first constitutional charter in the year 1875, thereby exercising a home rule charter form of government pursuant to Article IX, Section 16, Constitution of the State of Missouri, 1875, as amended.

The City of Kansas City, Kansas is a municipal corporation of the state by virtue of Section 5, Article XII of the Constitution of the State of Kansas, 1859; pursuant to an amendment in 1961 of said Section of the Constitution it was granted authority to exercise home-rule powers by charter ordinances.

The City of Kansas City, Missouri has a manager, council form of government, and the City of Kansas City, Kansas is a first-class city of the state with a mayor-commission form of government.

This cause presents to the Court the issue as to whether or not a so-called "private" developer of land and property is, in exercising his right to plat, subdivide, develop and sell land and homes pursuant to state and local regulations and restrictions, subject to the prohibition allegations contained in the federal constitutional and statutory prohibitions against discrimination based solely on race or color. Inasmuch as in the exercise of their police power the amici herein are deeply concerned and affected by the subdivision and development of land, including residential subdivisions, they are acutely interested in this cause. Subdivision of and development of land and residential property is recognized to be substantially affected with the "public interest", as demonstrated by statutory authority to provide through subdivision regulations and restrictions for coordinated street layouts, adequate and convenient open spaces for traffic, utilities, access of firefighting apparatus, recreation, light, air and avoidance of population congestion.[2] The improvement

2. The importance of coordinated development of lands in metropolitan areas or regions in order to promote and protect the general welfare, health, safety and prosperity of the inhabitants of the communities is evidenced by the enactment of laws to allow joint cooperation in area planning throughout the metropolitan areas to be exercised by metropolitan planning com-

of real property, the subdivision of land, the use and occupancy of premises and the erection of buildings all have been universally recognized as affected with such public interest and concern to justify and require the imposition of regulations, prohibitions and restrictions, by zoning laws and subdivision regulations; all for the purpose of promoting and protecting the health, safety, morals and general welfare of the community in general, and its citizens in particular. It is in the recognition of such underlying public concern that cities such as Kansas City, Missouri and Kansas City, Kansas have been empowered to enact its zoning laws and subdivision regulations.[3]

Residential subdivision development is directly and substantially related to the public function fulfilled by the control and enforcement of the zoning laws and subdivision regulations, which are primarily intended to provide for the harmonious, convenient, efficient and economic development of the city and the welfare of its inhabitants.[4] Platting and subdivision of lands within the municipalities must be "made according to the general law of the state",[5]

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missions. Chapter 12, Article VII, Section 12-705, General Statutes of Kansas, K.S.A., 1963; Chapter 12, Article VII, Section 12-716, et seq.; General Statutes of Kansas, enacted L. 1957, Chapter 101, Section 1-6.

3. Chapter 65, Section A, Revised Ordinances of Kansas City, Missouri, 1956, as amended, January 1, 1963; The City of Kansas City, Missouri, is empowered by Section 1(55), Article I of its constitutional Charter, 1925, as amended to ": . . divide the city into districts and for each of such districts to impose regulations, restrictions, or prohibitions designed to promote the public health, safety, convenience, comfort, morals, prosperity and general welfare, governing the erection of buildings and other structures and of premises to be used for trade, industry, residence or specified purposes; . . . regulating building lines and limiting the percentage of lot occupancy and regulating and limiting the area of courts and other spaces. . . ."

4. Chapter 13, Article I, pp. 11, 15, Sections 1301, 13-1109-1111, 13-1501, General Statutes of Kansas, K.S.A., 1963.

5. Article XI, Section 359, Constitutional Charter of Kansas City, 1925, as amended.

approved by the city plan commission and the director of public works and accepted by the council of the city in order that it have full effect and validity.[6] Subdivision plats and development plans are required to provide for the dedication to public use of streets, alleys, public highways, as well as easements, public utilities, all of which are subjected to the exclusive control of the city.[7] The city plan commission of the City of Kansas City is further granted the exclusive power to prepare and recommend plans of all facets of planning, zoning, platting and subdivision of lands for development and residential use.[8]

The amici-municipal corporations have officially been directly concerned and interested in the complete freedom and liberty of its citizens as granted and guaranteed by the Constitution of the United States and the constitutions of their states, and have been active through their legislative bodies in prohibiting discrimination on account of race or color by the enactment, pursuant to their police powers, of "civil rights" legislation. Both municipalities

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6. Article XI, Section 360, Ibid.

7. Article XI, Section 362, Ibid.

8. See Appendix, page A9; Article XIV, Sections 400-401, Charter of Kansas City, 1925, as amended.

Platting and subdivision of lands is strictly controlled and regulated by the code of general ordinances of Kansas City, Missouri, pursuant to its police power and is likewise affected with public interest and public function. No building permits may be issued, no subdivision plat validly recorded and no lots or lands sold in subdivisions, traded or conveyed except that the development strictly comply and qualify under the subdivision regulations and zoning laws of the city; Sections 31.15-31.14, Article II and Sections 31.4-31.5, Article I, Chapter 31, Code of General Ordinances of Kansas City, Missouri, as amended. See Appendix A4-A5. Subdivision regulations thereafter contained 29 sections providing for minimum design standards for blocks, streets, lots, rights of ways, side yards and frontages, setbacks, layouts, public utility easements, parks and other open spaces.

have enacted public accommodations legislation and have adopted fair housing acts.[9]

The fundamental purposes to be fulfilled by this legislation is indicative of the interest of these amici in this cause. The Board of Commissioners of the City of Kansas City, Kansas, in enacting its fair housing ordinance "declared (it) to be the policy of the city . . . to bring about good, wholesome and decent housing accommodations through fair and lawful adjustment procedures and penalties for violators who deny any person the opportunity to enjoy said housing accommodations on account of race, religion, national origin, or ancestry."[10] The city council of the City of Kansas City, Missouri, announced its policy by preceding its fair housing act provisions with a preamble declaring "that racial prejudice and bigotry and the discrimination and disorder occasioned thereby threatened not only the rights and privileges of its inhabitants, but are injurious to public morale, safety and the general welfare; and to the end that such prejudices and bigotry shall be reduced or eliminated".[11]

9. The Council of Kansas City, Missouri, enacted a "public accommodations" ordinance on July 15, 1960. On July 21, 1967, it enacted by ordinance a "fair housing" act, Appendix A1, which made it unlawful for any real estate broker, salesman or employee, bank, money lending, credit securing or other financial institution to effect or commit a discrimination with respect to prospective transfer or transfer of any interest in housing accommodations.

10. Ordinance No. 46565, an ordinance relating to discrimination in housing, section 1, enacted September 7, 1967. Appendix A4.

11. Committee Substitute for Ordinance 32546, as amended, enacted July 21, 1967. The declaration of policy is expressly set forth in Section 39.271 of the fair housing act and provides: "It is hereby declared to be the public policy of the City of Kansas City to bring about, through fair and lawful adjustment procedures and infliction of lawful punishment upon recalcitrant violators, the opportunity for each natural person to enjoy, as far as his individual capacity and ability permits, good, wholesome, and decent housing accommodations, without regard for his race, religion, national origin or ancestry."

Although this type of legislation is unquestionably a constitutional and valid exercise of the police power vested in these cities as local governments or municipal corporations through the delegation of the state police power, they are necessarily limited in their impact and effectiveness by reason of local jurisdictional boundaries, which is of particular and crucial importance in large metropolitan areas such as Kansas City and St. Louis. As of 1960, Kansas City Metropolitan Area had a total population of 1,039,493. Of this total, the population of the City of Kansas City, Kansas, was 121,901, 23.1 percent of which is Negro; and of the City of Kansas City, Missouri, 475,539, 17.5 percent of which is Negro. The demographical statistics bespeak of discrimination and segregation in suburban residential housing and of the limited impact and effect of legislation of fair housing acts by the urban center municipalities.

The City of Kansas City, Missouri, is situated in three counties of the State of Missouri: Jackson County, Clay County and Platte County; and the largest portion of the City's population lies, however, within Jackson County. Clay County has a total population of 87,474 and Platte County population is 23,350 and would be generally described as lying outside the center city. It is not to be unexpected that Clay County should have a Negro population of 0.8 percent and Platte County a Negro population of

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"It is further declared that this grounded upon a recognition of the unalienable right of each natural person to provide for himself and his family, a place of abode according to his own choosing and as sufficient as his individual talents, industry, and circumstances permit, and respecting the identical right of other natural persons; and, further, that the denial of such right through consideration solely based upon race, religion, national origin or ancestry is detrimental to the health, safety and welfare of the inhabitants of the City of Kansas City and constitutes an unjust denial or deprivation of such unalienable right which is properly within the power of government to prevent. . . ." The fair housing act of the City of Kansas City, Missouri, is set forth in the appendix at pages A1-A3.

1.2 percent; a substantial contrast to the 13.5 percent Negro population within the boundaries of Jackson County, which has a total population of 622,732, and the 17.5 percent Negro population of Kansas City, Missouri.

On the other side of the state line, the metropolitan portions of Kansas City SMSA are situated primarily in the counties of Johnson and Wyandotte. Although Kansas City, Kansas, as it has been noted, has a 23.1 percent Negro population, the County of Wyandotte on the whole, within which Kansas City, Kansas, is situated has a Negro proportionate population of only 16.7 percent, although it is substantially larger in total population than the City of Kansas City, Kansas; Wyandotte County having a total of 185,495. In shocking contrast, the County of Johnson, which has a 476 square mile area and a total population of 143,792, has a proportionate Negro population of 0.7 percent. The County of Johnson has some 15 municipalities within its suburban residential area, the largest of which is Prairie Village, Kansas, with a population of 25,356 in a six square mile area. It has a proportionate Negro population of 0.1 percent.[12]

The conclusion to be drawn from this empirical data would seem to be obvious. The City of Kansas City, Kan-

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12. Mention should be made as to the income characteristics of portions of the Kansas City Metropolitan Area. The 124,591 families in Kansas City, Missouri, had in 1959 a median income of $5,906; 17.6 percent of the families had an income under $3,000. The 31,880 families in Kansas City, Kansas, had a median income of $5,583; 18.1 percent had an income under $3,000. These statistics are in sharp contrast to those for the suburban areas: Johnson County, Kansas, had within its area 37,915 families with a median income of $8,161; only 7.2 percent had a median income under $3,000. Jackson County, Missouri, with 164,169 families who have a median income of $6,028 with 15.9 percent having an income under $3,000.

All statistics referred to herein are based on United States Bureau of Census, United States Census of population: 1960, general population characteristics and general, social and economic characteristics for the states of Missouri and Kansas.

sas, and the City of Kansas City, Missouri, within which the majority of the total population of the metropolitan area and 111,378 Negroes out of a total metropolitan Negro population of 118,502 reside, have only limited jurisdiction and control by enactment of "civil rights" legislation over the majority of the metropolitan area; little, if any, over the areas typically classified as "suburban". Recognizing the impact of this empirical data and giving full effect to sheer statistics placed within an historical context, the amici curiae do hereby recognize that the preservation and protection of the civil, legal rights of its inhabitants and the citizens residing in the Kansas City Metropolitan Area must ultimately rely on the applications of the theories and doctrines presented to this Court by the issues involved in this cause; notwithstanding the recognition of the fundamental principles and the crucial problems underlying the entire subject matter of discrimination in housing accommodations on the basis of race or color as set forth in policy declarations hereinbefore referred to when these two local governments enacted their "civil rights" legislation.[13] In addition to the restrictions arising by reason of their local jurisdictional boundaries, there remains the power vested in their electorate to exercise the right of referendum to appeal such local legislation.

13. The increase in proportion of Negroes in major urban centers is a widely and universally recognized nationwide trend. Leo F. Schnore, The Urban Scene; Human Ecology and Demography (New York: Free Press, 1965). The author commented that "without exception, these 50 metropolitan centers (50 largest cities in the continental United States), regardless of their regional location, show increases in the proportion non-white." Ibid., page 257. The author further described the modal pattern of development in the following way: ". . . Both whites and non-whites are leaving the very core of the central city . . . while the non-white residents are accumulating there very rapidly; the outer zone of the central city is adding to its white population at a much reduced rate; the suburban ring is drawing at an extremely fast rate . . .; in absolute numbers almost all of the total increase in the (suburban) ring is the result of additions to the white populations. . . ." Ibid., page 276.

Although dedicated to the preservation and protection of the fundamental civil rights of their inhabitants, as citizens of the United States, and as prescribed and guaranteed them by the Constitution of the United States, the power and jurisdiction of these local governments are necessarily limited and restricted. It is in the context of this dilemma that the amici curiae, cities of Kansas City, Missouri and Kansas City, Kansas, present this brief in support of the petitioners in this cause

SUMMARY OF ARGUMENT

I

Section 1978 of the Revised Statutes (42 U.S.C. 1982) finds its legislative source in the Civil Rights Act of 1866, and its plain object and intent is to guarantee to all citizens, and by reason of its historical context in particular non-whites, full and equal rights to acquire, own and enjoy real property. Although the direct constitutional source of congressional power to enact the said statute may be open to debate, the constitutional context within which the statutory guarantee was established remains unequivocally to be the adoption of the 13th and 14th Amendments to the Constitution.

The general policy of developing racially segregated residential communities by discriminatorily refusing to sell residential property to members of the Negro race is expressly prohibited by Section 1978, when the said statute is examined in light of its constitutional and legislative history; notwithstanding, respondents may or may not be acting within the scope of "state action", such statute having not been limited by its express terms to the States or persons acting pursuant to state powers or in the context of state enforcement or participation.

II

The 14th Amendment guarantees to all citizens the fundamental civil right to acquire, own, enjoy and dispose of real property without discrimination by reason of race or color, and any such discrimination is prohibited by the equal protection of the laws clause. The 14th Amendment is addressed directly to the states, but likewise recognized as applying to private individuals or corporations whose discriminatory acts or conduct are committed while exercising the state powers or functions, or when encouraged by the state or the state becomes involved or participates in some manner in their otherwise private activities or enterprises.

The platting, subdivision and development of private lands into large residential communities is substantially intermingled with the exercise by the states or their political subdivisions of their broad police powers in regulating, controlling and limiting such activities or enterprises. The subdivision of lands and the development of such residential communities has a direct impact on the public interest by reason of the size and complexity of the modern society and the large metropolitan areas which now exist, and are therefore sufficiently brought within the area of public domain. Giving full recognition to this undeniable conclusion, which amici contend has been universally accepted, and considering the other aspects relating to the regulation and licensing of private individuals and corporations by the states and local governments, the states and local political subdivisions have become so involved in the entire subject matter of zoning and subdivision development that broad and general policies of racial segregation in the same fall within the prohibitive scope of the 14th Amendment.

In addition thereto, or in the alternative, amici would contend that persons who are denied equal treatment solely by reason of race or color in the acquisition and enjoyment of property in segregated residential subdivisions or communities are deprived of the equal protection of the laws directly by the state. The state's inaction or omission indirectly permits and encourages the development of racially segregated communities resulting from the state's so-called "neutral" discrimination policy, and does thereby violate by such inaction the 14th Amendment.

III

The development of racially segregated communities by the discriminatory policies of racial exclusion followed by private subdevelopers and real estate agents controlling such communities creates a de facto apartheid society and subjects the persons excluded by reason of race or color to a stature of inferiority and second class citizenship. The development of such communities and the policies and practices from which the same are created are contrary to the fundamental precepts of a republican form of government and prevent the realization of freedom and liberty for all citizens, and do therefore directly violate and are prohibited by the 13th Amendment of its own force notwithstanding the absence of ancillary legislation.

ARGUMENT

I

The Refusal to Sell Residential Property Solely Because of Discrimination Against the Race or Color of the Prospective Buyer Is a Deprivation of a Fundamental Civil Right Explicitly Protected by and Is a Policy Prohibited by Section 1978 of the Revised Statutes.

The right of every citizen of the United States to acquire, enjoy, own and dispose of property is a fundamental

civil right intended to be guaranteed and protected by the 14th Amendment. This Court has previously declared that "equality in the enjoyment of property rights was regarded by the framers of that amendment as an essential precondition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee." *Shelley* v. *Kraemer*, 334 U.S. 1, 10, 92 L.Ed. 1161, 1179 (1948). Although it may be argued that the general policy of racial exclusion from the subdivision of Paddock Woods, developed by respondents, is directly prohibited by the 14th Amendment without reliance on substantive legislative implementation, Section 1978 of the Revised Statutes, 42 U.S.C. 1982, provides explicit statutory recognition of a fundamental civil right guaranteed to petitioners by the 14th Amendment, which provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Although a review of the civil rights jurisprudence questions the constitutional source of this congressional enactment, there can be no debate that it finds its historical source in the design and intent of both the 13th and 14th Amendments. Shortly after the 13th Amendment was certified whereby slavery and involuntary servitude were abolished and prohibited, Congress enacted the first civil rights statute, commonly known as Civil Rights Act of 1866, Chapter 31, 14 Stat. 27, which provided:

> "Be it enacted . . . that all persons born in the United States and not subject to any foreign power . . . , hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery and invol-

untary servitude, shall have the same right . . . to inherit, purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white citizens . . ."

Basically it is from this section of the Civil Rights Act of 1866 that Section 1978 of the Revised Statutes was derived. Amici would here intend moreover, that this section of the Federal Statutes should be interpreted and applied not only in the historical context of the civil rights amendments to the Constitution, but likewise in the context of the complicated and integrated social economic society of today. In this context certainly the statute is intended to preserve and protect more than a mere legal capacity or competency to acquire, enjoy, own and dispose of real property, but should permit the enforcement by petitioners of the full and complete enjoyment of and equal treatment as to their property rights, as expressly dictated and required by the language of Section 1978 of the Revised Statutes.

The plain object and purpose of this statute is to entitle petitioners to full and equal treatment in respect to their civil right to acquire and own property in Paddock Woods on a level granted to whites. The exclusionary and discriminatory practice of respondents clearly and obviously is inequal treatment and a deprivation of the fundamental civil right to acquire, enjoy and own property to which petitioners are entitled. This conclusion must result from an interpretation and application of the statute which is realistic and accords the full intent and design of the statute as derived from its historical context and purpose. This case requires more than a purely theoretical approach couched in a discussion of impersonal and abstract truths and principles. The issues here before the Court require full consideration of the fundamental intent and purposes

of the civil rights statutes and Amendments viewed in the context of today's complex social economic society and acknowledging the undeniable impact of efforts to preserve segregated communities and neighborhoods through the deprivation of equal rights to acquire property through exclusionary practices based on racial discrimination.

As clearly and as effectively as was the respondents' policy implemented by local legislation, the general policy followed by respondents in developing their suburban community is offensive to the rights of those desiring, and particularly in the instant case of these petitioners, to acquire, own, occupy and enjoy property in the fulfillment and satisfaction of their fundamental civil right to so do. Such local legislation would obviously violate the 14th Amendment. *Harmon* v. *Tyler*, 273 U.S. 668, 71 L.Ed. 831, 47 S.Ct. 471 (1927); *Buchannan* v. *Warley*, 245 U.S. 60, 62 L.Ed. 149, 38 S.Ct. 16 (1917). Although, assuming arguendo that there is no state action involved in the respondents' discriminatory policies, respondents' exclusionary policy grounded in a discrimination of race or color would not be prohibited by the 14th Amendment, *Shelley* v. *Kraemer*, supra, 13, 1180, petitioners' fundamental civil rights are in no less degree denied them and are explicitly violated by such policy and therefore proscribed as unlawful by Section 1978 of the Revised Statutes. Certainly the ultimate impact and purpose of respondents' action is no less a deprivation of the enjoyment and equality of a civil right than the restrictive covenants and legislation which have as their purpose exclusion of persons from a designated race or color from the ownership or occupancy of real property, which have been struck down by this Court as prohibited by the 14th Amendment. The crucial and decisive issues of the instant case cannot be fully resolved by reference to those cases, however, inasmuch as they did not involve

an attempt to enforce the petitioners' fundamental property rights through the congressional legislation of Section 1978 of the Revised Statutes as now before this Court.

Although the Enforcement Act of 1870 provided in Section 16 thereof for the reenactment of the Act of 1866, and the later enforcement act was adopted pursuant to Section 5 of the 14th Amendment, Section 1978 of the Revised Statutes does not refer in its terms to state action and is not by its terms restricted to the acts of the state or its officers or persons under color of law or pursuant to state action or powers.

To hold that Section 1978 applies against respondents, although individuals and private corporations so as to make unlawful their racial exclusionary policy does not in any way violate the earlier jurisprudence of this Court with respect to the "state action" concept applied to the 14th Amendment. This Court has recently found and held Congress to be empowered to make unlawful the acts of private individuals not acting under color of law when seeking to interfere or deprive persons of their civil rights or immunities pursuant to the enforcement power granted by Section 5 of the 14th Amendment. *United States* v. *Price, et al.*, 383 U.S. 787, 16 L.Ed. 2d 267, 86 S.Ct. 1152, (1966).[14]

To apply Section 1978 against the discriminatory racial policy of respondents cannot be reasonably and con-

14. Justice Fortas discussing the construction of constitutional grants of congressional power stated: "We have no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the due process clause of the 14th Amendment' ". Ibid. 270, 789.

Justice Clark in his separate, concurring opinion in *United States* v. *Guest*, 383 U.S. 745, 16 L.Ed.2d 239, 86 S.Ct. 1170, stated at pages 762, 252, "that there now can be no doubt that the specific language of Section 5 empowers the Congress to enact laws punishing all conspiracies with or without state action—that interfere with the 14th Amendment rights".

stitutionally objectionable merely because they are private individuals or private corporations. *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, 379 U.S. 241, 291, 13 L.Ed. 2d 258, 288, 85 S.Ct. 348 (1964); J. Black concurring, 275, 276. The words of Mr. Chief Justice Marshall uttered in *McCulloch* v. *Maryland*, 4 Wheat. 416, 421, 4 L.Ed. 579, 605, as reiterated by Justice Black at page 279 in the *Heart of Atlanta* case make well the point stressed here by amici:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

The very position of amici taken in the instant case on this issue was recognized by Justice Black, Ibid., 279—that it cannot be denied that "the aim of protecting Negroes from discrimination is also a legitimate end" in the view of the 13th, 14th and 15th Amendments.

Clearly, if Section 1978 is to have any real and effective meaning in today's society and in the milieu of the economic and social conditions of the Nation, the fullest, rational meaning and the broadest application must be given its terms and underlying intent. Just as "the primary purpose of the Civil Rights Act of 1964 . . . is the vindication of human dignity . . .", J. Goldberg concurring, *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra, it is no less true that, regardless of whether Section 1978 was derived from the 13th or 14th Amendment by virtue of the enforcement powers provided therein, the primary purpose of that statute remains "the vindication of human dignity" by explicitly providing for equal availability, access and enjoyment of property rights. Whether discussing public accommodations or housing, discrimination or segregation

on the basis of race or color unequivocally result in the deprivation of personal dignity and fundamental civil rights. The ultimate impact of such racial discrimination and segregation is the same in any instance, as that set forth in Justice Goldberg's concurring opinion, Ibid.,

> " 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that, regardless of education, civility, courtesy, and morality, he will be denied to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.' "

Though Section 1978 may be interpreted as deriving its source solely from Section 5 of the 14th Amendment, under the factual circumstances of the instant case there was a concerted effort by the various respondents herein to deprive petitioners of a basic fundamental right guaranteed and secured to them by the 13th and 14th Amendments. Such action was, furthermore, in direct violation of Section 1978 though it may be finally construed as wholly private action not taken under color of law or without participation or encouragement from the state and not therefore otherwise directly proscribed by the express terms of the 14th Amendment. Without further burdening the Court with repetitious argument, amici would here state to the Court their full and complete support of the exhaustive analysis made in Point II of the argument in the brief presented by the United States as amicus curiae.

II

A General Segregation Policy Enforced by Refusal to Permit Persons to Acquire Property Solely by Reason of Their Race and Color Is Prohibited by the 14th Amendment Though Such a Policy Is Not Implemented or Protected by State Legislation, Committed by State Officers or Persons Acting under Color of Law.

It is readily conceded that "the Civil Rights Cases, 109 U.S. 3, 27 L.Ed. 835, 3 S.Ct. 13 (1883), 'imbedded within our constitutional law' the principle 'that the action inhibited by the first section (equal protection clause) of the 14th Amendment, is only such action as may be fairly said to be that of the State. That amendment erects no shield against merely private conduct, however discriminatory or wrong.'" *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45, 50. Although the prohibitions of the 14th Amendment are addressed to the States, "they have reference to actions of the political body denominated a state, *by whatever instruments or in whatever modes that action may be taken . . .*" *Ex Parte Commonwealth of Virginia and J. D. Coles*, 100 U.S. 339, 346, 25 L.Ed. 676, 679 (1880). Whoever, by virtue of state power, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the 14th Amendment constitutional inhibition; for in whatever respect he possesses state power or the state through substantial involvement encourages or permits such prohibited acts, then the state has clothed one acting pursuant to state action and power to annul or evade constitutional rights and privileges. Ibid., 347, 25 L.Ed. 679.

The 14th Amendment by its terms reaches not only acts done by state officers which are within the strict scope

of the power conferred by the state, officers within the strict scope of the powers possessed, but acts committed or policies followed by private individuals or corporations to whom state power has been delegated and is used to commit acts or engage in conduct which the Amendment forbids, even though the consumption of the wrong may not be within the powers possessed. *Home Telephone and Telegraph Company* v. *City of St. Louis, et al.*, 227 U.S. 278, 57 L.Ed. 510 (1913). The Court in the last cited case, in reviewing constitutional objections to a municipal ordinance fixing telephone rates so unreasonably low that enforcement would bring about confiscation of property of the corporation without due process of law, expressly recognized that the provisions of the 14th Amendment are generic in their terms and addressed to the States as well as to every other person, whether natural or juridical, who is the repository of state power. "By this construction, the reach of the amendment is shown to be coextensive with any exercise . . . of (state) power, in whatever form exerted". Ibid., 227 U.S. 278, 286, 287.[15]

This Court has in more recent times applied the prohibitions of the 14th Amendment to instances wherein private individuals and private corporations are involved notwithstanding objection that such application denies

15. The Court in *Home Telephone and Telegraph Company* v. *St. Louis et al.*, 227 U.S. 278, 288, 57 L.Ed. 510, 515 (1913), described the provisions of the 14th Amendment in the following language:

> "The amendment, looking to the enforcement of the rights which it guarantees to the prevention of the wrongs which it prohibits, proceeds not merely on the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which may conflict with the provisions, but also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result, might be used as an instrument for doing wrongs, provided against all and every such contingency."

said private individuals or corporations of the equal protection of the laws and due process by denying them the freedom of association or selection of those to whom their services are to be rendered. *Burton* v. *Wilmington Parking Authority*, supra; *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, 379 U.S. 241, 13 L.Ed. 2d 258, 85 S.Ct. 384 (1964); *Bell* v. *Maryland*, 378 U.S. 226, 12 L.Ed. 822, 84 S.Ct. 814. Although it may be reasoned that the "civil rights" statute, Section 1978 of the Revised Statutes, is addressed to the states and requires the involvement of some form of state action in order to justify finding of its provisions violated by the conduct of the respondents in the instant case, *Hurd* v. *Hodges*, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187; *Canon* v. *Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, this action need not be direct state legislation. *Burton* v. *Wilmington Parking Authority*, supra; *Evans* v. *Newton*, 382 U.S. 296, 15 L.Ed. 2d 373, 86 S.Ct. 486. Moreover, this court has continually expanded the concept of "state action" enough to bring the respondents in the instant case within the proscriptions of the 14th Amendment.

The simple fact that respondents in the instant case are private individuals or private corporations is not in and of itself a shield against the 14th Amendment prohibition. This Court has consistently refused to permit assertion on the part of private individuals or corporations of the due process of law and equal protection of the law guarantees to thereby raise constitutional immunizations in cases of discriminatory acts or conduct violating the equal protection of the laws provision of the 14th Amendment where such discriminations were based solely upon race or color. *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953); *Burton* v. *Wilmington Parking Authority, Inc.*, supra; *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra. The Constitution con-

fers upon no individual the right to demand action by the state which results in denial of equal protection of the laws to other individuals, *Barrow* v. *Jackson*, supra, 260, 1597, and the Court has applied a broad test of determining state responsibility so as to predicate its consequence upon state action of every kind so as to bring within the prohibitive scope of the 14th Amendment "state participation through any arrangement, management or funds or property". *Burton* v. *Wilmington Parking Authority, Inc.*, supra, 365; *Cooper* v. *Aaron*, 358 U.S. 1, 4, 3 L.Ed. 2d 1, 9, 78 S.Ct. 1397, 1401 (1958).[16]

As for the formula or test to be applied in determining whether certain conduct or acts abridge the equal protection clause, the Court in *Burton*, supra, at pages 365, 50, indicated the broad application of the state action concept in the following language:

> "Because of the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships, which the amendment was designed to embrace. For this same reason, to fashion and apply a precise formula for recognition of state responsibility under the equal protection clause is an 'impossible task' which 'this Court has never attempted . . .' Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."

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16. This principle of state involvement was couched by this Court in *Burton* v. *Wilmington Parking Authority, Inc.*, supra, 365, 50, in the following language: "It is clear, as it has always been in Civil Rights Cases (U.S.), supra, that 'individual invasion of individual rights is not subject matter of the amendment', at page 11, and that private conduct of bridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it."

As discussed by the amici in their statement of interest, they would reiterate at this point that the business enterprise of respondents carried on in the subdivision and development of lands within St. Louis County, a suburban "community", is in the milieu of the facts and circumstances of such enterprise to be so substantially affecting the public interest as to be impregnated with public interest and governmental character as to come within the broad scope of the 14th Amendment prohibitions. The platting, development, use and occupancy of residential subdivisions is directly and substantially related to the exercise of state's and local government's police powers, including St. Louis County in the instant case, for the courts have recognized that the very authority of state and local governments to limit, restrict and regulate the subdivision and development of lands within its corporate boundaries are founded on their effect upon the public interest. The general object and design of zoning laws and subdivision regulations is to promote, preserve and protect the public health, safety, morals and welfare of the inhabitants of the state, county or municipal corporation adopting the same. *Brown* v. *Beuc*, 384 S.W.2d 845 (Mo.); *St. Louis County* v. *City of Manchester*, Mo., 360 S.W.2d 638; *Hoffman* v. *Kinealy*, Mo., 389 S.W.2d 745; *State ex rel. Cooper* v. *Cowan*, Mo., 307 S.W.2d 676; and *State* v. *Christopher*, 317 Mo. 779, 298 S.W. 720. The suburban community of Paddock Woods being developed by respondents was from its very inception planned, designed and developed only by virtue of the regulations, restrictions and limitations embodied in the subdivisions of St. Louis County, Chapter 1005 (petitioners' appendix, pages 69, et seq.), which were enacted pursuant to and by virtue of Section 64.060 of the Missouri Statutes. Only by virtue of these provisions of the law could respondents, although

private individuals and corporations and owning land outside of some public redevelopment project, and although without federal or state financing, develop the subdivision of Paddock Woods. In addition thereto, the respondents' subdivision developer, Alfred H. Mayer Company, exclusive real estate dealer and sales agent, Alfred Realty Company, and the Paddock Country Club, Inc. are permitted to engage in this business enterprise only by virtue of and in compliance with the corporation and business laws of the State of Missouri. Thus, although respondents are private individuals and corporations, as distinguished from a public or governmental agency or corporation, the business enterprise of the subdivision and development of residential land and property and homes is an enterprise which has become today substantially related to the public interest.

Amici here contend that there is such state involvement in and cooperation with the development of respondents' residential suburban community that the consequences of such state action must devolve upon respondents' activities so as to bring them within the prescription of the 14th Amendment as it was found in *Burton* v. *Wilmington Parking Authority, Inc.*, supra, which case amici contend gives perspective to the issues of the instant case notwithstanding the factual distinction, none of which amici would argue defeat a finding of state action or involvement in the instant case, wherein the Court concluded at page 376, that:

> "The state has so far insinuated itself into a position of interdependence with evil that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the 14th Amendment."

Justice Douglas, in discussing the distinction to be made between private and state action in determining the balance between the right to discriminate and freedom of association and equal protection of the laws, had this to say in *Evans* v. *Newton*, supra, at page 299:

> "What is 'private action' and what is 'state action' is not always easy to determine. . . . The conduct that is formerly private may become so intertwined with government policies and so impregnated with governmental character as to become subject to constitutional limitations based on state action. . . . A town may be privately owned and managed, but that does not necessarily allow the company to treat it as if it were wholly in the private sector. . . . A state is not justified, we said, in 'permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . .' (*Marsh* v. *Alabama*, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276), at 509, 90 L.Ed. 270 . . . That is to say that when private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations."

The situation and the issues presented to the Court in the instant case are entirely analogous with those before the Court in *Marsh* v. *State of Alabama*, 326 U.S. 501, 90 L.Ed. 265 (1946), and amici would contend that the fundamental issues involved in both the instant case and that then before the Court are quite similar and that the result reached therein gives to petitioners substantial support in the contention that the exclusionary policy based solely on race or color followed by respondents in refusing to sell residential property in the suburban community which they had developed is proscribed by the 14th Amendment. Just as in *Marsh*, so it is true here that should such a policy be prescribed by state or local law or custom, it would clearly violate the Constitution. The mere fact that

Paddock Woods, a suburban community, is owned by respondent corporations and controlled and managed by them and eventually by a homes association cannot justify unrestricted discrimination against petitioners by refusing to permit them to reside in such community and thereby depriving them of their fundamental civil right to purchase, own and enjoy property on equal terms and according to equal treatment with Caucasians. See also *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953), wherein it was clearly determined that the refusal to sell to non-Caucasians or to require them to pay a higher price for property solely because of their race violated the equal protection of the law provisions of the 14th Amendment by depriving them of the ability to purchase, own and enjoy property on equal terms with whites.[17]

The mere argument that development of a private residential subdivision is a purely local matter or business of a purely local character or that the real issues involved here deal with moral and social equality rather than equality of civil rights raise no substantial objection under the entire circumstances and facts in the instant case so as to in and of itself deprive the petitioners of the equal protection and enforcement of their fundamental civil rights herein sought. *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra; See also Ibid., J. Black concurring, 275, 276; J. Clark for

17. The Court further held in *Marsh* v. *State of Alabama*, 326 U.S. 501, 90 L.Ed. 265 (1946), that:

> "We do not think it makes any significant constitutional difference as to the relationship of the rights of the owner and those of the public that here the state . . . permitted (the corporation) to use its property as a town. . . . Whether a corporation or a municipality owns or possesses the town, the public in either case, has an identical interest in the function of the community. . . . As we have heretofore stated, the town of Chickasaw does not function differently than any other town. . . . The manager appointed by the corporation could not curtail the liberty of press and religion of these people consistently with the purposes of the constitutional guarantees."

the majority, 269. Constitutional objections to the theories relied on herein in support of petitioners must necessarily be confronted with the idea so aptly expressed by Justice Black, Ibid., 280, that:

> ". . . It would be highly ironic to use the guarantee of due process—the guarantee which plays so important a part in the 14th Amendment, an amendment adopted with the predominant aim of protecting Negroes from discrimination—in order to strip Congress of the power to protect Negroes from discrimination."

It would seem to be logically arguable that the development of residential suburban communities in large metropolitan areas has no less a direct and substantial relation to the public interest and public functions as the private enterprises named in the public accommodations sections of the Civil Rights Act of 1964. Residential suburban development does in fact have a direct and substantial effect on the public welfare so as to bring such an enterprise significantly within the public domain and so intermingle it in the public interest and the exercise of the police power of the state and local governments that they now fall within the prescriptions of the 14th Amendment.[18] *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra. As noted by this Court in *United States* v. *Guest, et al.*, 383 U.S. 745, 16 L.Ed. 2d 239, 86 S.Ct. 1170, "the involvement need not be either exclusive or direct for in a variety of situations this Court has found state

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18. Thus the issue in the instant case is much the same as that with which the Court was presented in *Evans* v. *Newton*, supra, 298, 377, wherein the Court stated the issues thusly:

> "There are two complimentary principles to reconcile . . . one is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such groups and clubs as he chooses. The other is the constitutional ban in the equal protection clause of the 14th Amendment against state-sponsored racial inequality. . . ."

action even though the participation of the state was peripheral or its action was only one of several cooperative forces leading to the constitutional violation."

To permit without constitutional limitations the exclusion of Negroes solely because of their race from the suburban community developments such as Paddock Woods, has as its immediate objective and ultimate impact, viewed in an historical context, a denial of equality and deprivation of fundamental civil rights not unlike that resulting from the so-called "Proposition 14" found prohibited by the "equal protection of the laws" clause of the 14th Amendment of the Constitution of the United States by this Court in *Reitman* v. *Mulkey*, ... U.S. ....., 18 L.Ed. 2d 830, 87 S.Ct. ..... (1967).[19] This Court affirmed the California Supreme Court's interpretation of the immediate design and intent of Proposition 14 "to overturn state laws that bore on the right of private sellers and lessors to discriminate", and establishes "a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the 14th Amendment should state action be involved." Ibid., 18 L.Ed. 2d 834.

The State of Missouri could not directly establish in private individuals or corporations an express right to discriminate on the basis of race or expressly approve a general policy of excluding and denying a right to Negroes to purchase and acquire property in any residential sub-

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19. Proposition 14 was an initiated amendment, Sec. 26 of Article I, to the California state constitution, and its general language applied to real property devoted to residential purposes. Its text provided in its first paragraph:

> "Neither the State nor any subdivision or agency thereof shall deny, limit, abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses."

division. Therefore, the question becomes can the State by remaining silent or following a "neutral position" permit the respondents to follow such a policy and thereby through exercising broad powers and privileges under state statutes and county subdivision regulations to do indirectly what the State would be prohibited by the 14th Amendment to do directly. The State of Missouri has by failing to guarantee the "equal protection of the laws" to petitioners made it legally possible for respondents to engage in racial discrimination which denies to petitioners equality and full enjoyment of their property rights. This inaction or omission on the part of the state has, it would seem in historical context "encouraged" discrimination by making it legally possible for respondents to follow a general discriminatory policy, and which has by its immediate objective and impact "authorized private discrimination" and made the state "at least a partner in the instant act of discrimination. . . ." Ibid., 835.

The State is in effect by inaction or omission in following a "neutral" position permitting and encouraging the racial discrimination committed by respondents in the exercise of powers and privileges granted by state statutes and county subdivision regulations. Historically, it has been held that zoning laws and subdivision regulations are affected with public interest of substantial nature and are directly related to the health, safety, morals, and welfare of the community, generally and its inhabitants. Although respondents are engaged in what is private enterprise, their business operations and activities in platting, subdividing and developing lands as "suburban communities" are ones affected with a high degree of public interest, and they have in the pursuit of private financial gain and profit secured the advantages and privileges of the statutes of the state and the provisions of county law. Historical conditions and the social and economic inequal-

ities resulting from discriminatory practices in the residential housing markets and the development of suburban communities dictate and demand, as never before, in the interest of equal civil rights for all citizens and the peace and order of the society, that state "inaction" as well as state action permitting discrimination against the right to acquire residential property and the development of white segregated communities be prohibited by the 14th Amendment to the Constitution of the United States. See J. Goldberg's discussion of state inaction, concurring opinion, *Bell* v. *Maryland*, supra, 378 U.S. 309-312. The contention here made by amici is not unlike the theory followed by this Court in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45, 81 S.Ct. 856, as reiterated in *Reitman* v. *Mulkey*, supra, 837.[20]

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20. This Court in deciding *Reitman* v. *Mulkey* reiterated the conclusion reached in *Burton* v. *Wilmington Parking Authority* giving emphasis to the state's policy of inaction in the following language:

> "In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45, 81 S.Ct. 856, the operator-lessee of a restaurant located in a building in this state and otherwise operated for public purposes, refused service to Negroes. *Although the state neither commanded nor authorized or encouraged the discriminations, the state had 'elected to place its power, property and prestige behind the admitted discrimination' and by 'its action . . . has . . . made itself a party to the refusal of service . . .' which therefore could not be considered purely private choice of the restaurant operator.*" (Emphasis supplied).

Justice Douglas noted in his concurring opinion in *Reitman* v. *Mulkey*, supra, 18 L.Ed. 2d 830, 838-839, the complex and concerted effort to maintain segregated communities followed by real estate brokers and mortgage lenders: "Real estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities. Realtors commonly believe it is unethical to sell or rent to a Negro in a predominantly or all white neighborhood, and mortgage lenders throw their weight alongside segregated communities, rejecting application by a member of a minority group who tries to break the white phalanx save and unless the neighborhood is in the process of conversion into a mixed or Negro community. We are all told by the Commission on Civil Rights:

Upon the foregoing authorities and the resolution of the instant issues as hereinabove reasoned, amici would

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"Property owners' prejudices are reflected, magnified and sometimes even induced by real estate brokers through whom most housing changes hands. Organized brokers have, with few exceptions, followed the principle that only a 'homogeneous' neighborhood insures economic soundness. Their views in some cases are so vigorously expressed as to discourage property owners who would otherwise be concerned only with the color of a purchaser's money, and not with that of his skin. The financial community, upon which mortgage financing—and hence the bulk of home purchasing and home building—depends, also acts to the large extent on the premise that only a homogeneous neighborhood can offer an economically sound investment. For this reason, plus the fear of offending their other clients, many mortgage-lending institutions refuse to provide home financing for houses in a 'mixed' neighborhood. The persistent stereotypes of certain minority groups as poor credit risks also block the flow of credit, although these stereotypes have often been unjustified." Housing, U.S. Commission on Civil Rights (1962), pages 2-3.

"The builders join in the same scheme: '. . . private builders often adopt what they believe are the views of whom they expect to sell and of the banks on whose credit their own operations depend. In short, as the commission on race and housing has concluded, 'It is the real estate brokers, owners and mortgage institutions, which translate prejudice into discriminatory action.' Thus, at every level of the private housing market members of minority groups meet mutually reinforcing and often unbreakable barriers of rejection."

As for the joint participation in the operation and impact of the zoning laws, Justice Douglas in his concurring opinion, supra, had this to say:

". . . (The) right to own or lease property is already denied to many solely because of the pigment of their skin; they are, indeed, under the control of a few who determine where and how the colored people shall live and what the nature of our cities will be. Second, the agencies that are zoning the cities along racial lines are state-licensees.

"Zoning is a state and municipal function . . . when the state leaves that function to private agencies for institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts and white or black ghettos, it suffers a governmental function to be performed under private auspices in a way the state itself may not act. . . .

". . . These licensees are designated to serve the public. Their licenses are not restricted, and could not be restricted, to effectuate a policy of segregation. That would be state action which is barred by the 14th Amendment. There is no

conclude thusly. If it be determined and held by this Court that Section 1978 of the Revised Statutes is intended to apply against and be directed only to the States and local governments or officers acting under state power or individuals or corporations with which the state is involved, then the general policy of refusing to sell to Negroes residential property within Paddock Woods by the respondent is so intertwined and intermingled with the exercise of the state police powers and affected with the public interest that the provisions of Section 1978 have been violated by the respondents. However, amici here emphasize their original position that, just as Justice Brennan, concurring, *United States* v. *Guest*, supra, 775, 779, found the provisions of Section 241, 18 U.S.C. (1964 Ed.) to be violated by a private conspiracy to interfere with a right secured by the Constitution, the racially discriminatory policies of respondents deprive the petitioners of the fundamental civil right guaranteed them by the 13th and 14th Amendments as expressly and explicitly declared by Section 1978.[21] Lastly, amici earnestly con-

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difference, as I see it, between a state authorizing a licensee to practice racial discrimination and a state, without any express authorization of that kind nevertheless launching and countenancing the licensing of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the state is impliedly sanctioning what it may not do specifically.

"If we were in a domain exclusively private, we would have different problems. But urban housing is in the public domain as evidenced not only by the zoning problems presented but by the vast schemes of public financing in which the states and the nation have been extensively involved in recent years. Urban housing is clearly marked with the public interest. . . ."

21. Justice Brennan, *United States* v. *Guest*, supra, 780, applied the same theory and reasoning to Section 241, 18 U.S.C., prohibiting conspiracies to deprive citizens of their constitutional civil rights; amici would refer the Court further to Justice Brennan's discussion of the congressional power contained in Section 5 of the 14th Amendment at page 782, *United States* v. *Guest*, supra.

clude that though the 14th Amendment does not restrict invasion of individual rights by purely private discriminations, the private businessman's invocation of the state police power to carry out his own policy of racial discrimination is contrary to the 14th Amendment guarantees secured to those against whom the racial discrimination is directed. *United States* v. *Guest*, supra, 756; *Bell* v. *Maryland*, 378 U.S. 26, 12 L.Ed. 2d 822, 84 S.Ct. 1814. The business enterprise of subdividing and developing the community of Paddock Woods must be recognized to be directly and substantially related to the state and local public interest. It is of such public consequence and so affects the community as a whole to become an enterprise within the public domain. Therefore, it is the contention of amici that by reason of these integrated principles and these particular facts, the racial exclusionary policy which barred petitioners from the acquisiton, ownership and enjoyment of property within Paddock Woods solely because of race or color denies to the petitioners the fundamental civil rights guaranteed them by the 14th Amendment, as well as Section 1978 of the Revised Statutes. The general policy of respondents complained of in this cause which is on its face blatant racial discrimination and creates a wholly segregated and closed residential community is by reason of the foregoing within the prohibitive scope of the 14th Amendment itself and must thereby be declared unlawful and unconstitutional racial discrimination.

III

The Thirteenth Amendment Is Self-Executing and Directly Prohibits the Racial Segregation Policy Followed by Respondents in Developing Suburban Residential Communities.

In addition to the contentions heretofore presented that the right to purchase, enjoy and dispose of property

has been recognized by the Constitution as and guaranteed as a basic fundamental civil right; is explicitly recognized by provisions of Section 1978 of the Revised Statutes; and entitled to the full protection guaranteed by the 14th Amendment, amici would contend and do hereby propose to the Court that the policy of discrimination by reason of race and color followed by respondents is prohibited directly by the 13th Amendment to the Constitution, notwithstanding Section 1978 of the Revised Statutes may be held to have been enacted and derived from the Enforcement Act of 1870 pursuant to Section 5 of the 14th Amendment. It is hereby contended that implementing congressional legislation is not necessary to permit this Court to grant petitioners the full protection intended by the provisions of and in accordance with the enactment of the 13th Amendment abolishing and prohibiting slavery and involuntary servitude. *Civil Rights Cases*, supra, l.c. 20. The 13th Amendment "abolished slavery and established universal freedom" and is "an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States". *Civil Rights Cases*, supra, 20. Although Congress is empowered by Section 2 thereof to enforce the same, "this amendment . . . is undoubtedly self-executing without any ancillary legislation . . ." Ibid.

To permit respondents to establish a suburban community within which Negroes are deprived of the right to acquire, own and enjoy property solely because of their race or color is to permit the perpetuation of the vestiges of the institution of slavery by the deprivation of this fundamental civil right; the resulting establishment of a de facto apartheid community is but a "badge of slavery or servitude". *Plessy* v. *Ferguson*, 163 U.S. 537, 555. The attempt by respondents to exclude persons because of their race is but an attempt to deprive petitioners to exercise and pursue the full enjoyment of their fundamental prop-

erty rights and the opportunity to exercise the privileges afforded by reason of the freedom, liberty and equality guaranteed them as citizens by the Constitution. *Shelley* v. *Kraemer*, supra; *Evans* v. *Newton*, 382 U.S. 296; *Buchanan* v. *Warley*, supra.

There is no need for speculation as to what the concept of "bondage", to be subjected to involuntary servitude, meant in its historical context prior to the passage of the 13th Amendment. The Negro race was regarded as an inferior race, "altogether unfit to associate with the white race, either in social or political relations." *Civil Rights Cases*, supra, J. Harlan, dissenting, 31:

> "It was regarded as an axiom in morals as well as in politics which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without for a moment doubting the correctness of this opinion." Ibid.

Since the passage of the Civil Rights Amendments, this Court has consistently held that the 13th, 14th and 15th Amendments to the Constitution expressly guaranteed to all citizens freedom, liberty and equality regardless of "race, color or previous condition of servitude." *Bell* v. *Maryland*, supra, 286, 833. It has been this standard which the Court has faithfully followed in giving the "equal protection" clause meaning as the "revelation of an enduring constitutional purpose" whereby racial segregation by law is declared to create unconstitutional inequality.

Segregation of suburban communities created by the racially exclusionary policy followed by respondents purely and simply perpetuates a caste system in the United States and is the antithesis of the design guarantees, and of the 13th, 14th and 15th Amendments to the Constitution.

The respondents' policy of refusing to sell its property to petitioners solely by reason of their race or color subjects them to second-class citizenship and establishes a de facto apartheid society which is, in the language of this Court, a separation of races by its " 'very nature odious to a free people whose institutions are founded upon the doctrine of equality' ". *Bell* v. *Maryland,* supra, 834, 288.

As the term "commerce" as used in the Constitution is today interpreted "to comprehend every species of commercial intercourse", *Heart of Atlanta Motels, Inc.* v. *United States, et al.*, supra, it may likewise be argued that the term "involuntary servitude", in the context of the times and today's highly complex society, should be realistically interpreted to comprehend every species of servitude, enforced or effected directly or indirectly; including the segregation or discrimination of persons by reason of color or race whereby they are subjected and enclosed within de facto racial ghettos because of policies effectively excluding them from the exercise of their fundamental civil right to purchase property in suburban residential communities, such as Paddock Woods in St. Louis County. The 13th Amendment was enacted for the purpose of uprooting the institution of slavery wherever it existed in the land and to establish universal civil freedom and liberty. It was intended, however, to do something more than merely prohibit slavery as an institution; it was intended as well to eradicate the badges and incidents of slavery to eliminate the burdens and disabilities which by their impact constitute badges of slavery and servitude and thereby "secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, . . ." *Civil Rights Cases,* supra, J. Harlan dissenting, at page 35. To permit respondents to follow a policy of racial discrimination in the development of residential suburban com-

munities is to perpetuate a society inflicted with "involuntary servitude" and "bondage" of a second class citizen, to make or allow such discrimination against the Negro race, in the enjoyment of those fundamental rights, which is a universal concession inherent in a state of freedom, is a gross contradiction of the intent and design of the 13th Amendment. Ibid., 34.[22]

The policy followed by respondents from which petitioners seek the protection of this Court is clearly contrary to the "pervading purpose" of the 13th Amendment. As stated by J. Harlan, *Civil Rights Cases*, supra, 44:

> "Remembering that this court, in the Slaughter-House Cases declared that the one pervading purpose found in all the recent amendments, lying at the foundation of each, and without which none of them would have been suggested, was 'The freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppression of those who had formerly exercised unlimited dominion over him'—that each Amendment was addressed primarily to the grievance of that race. . . ."

The right to purchase, own, enjoy and dispose of real property without discriminations based solely upon race or color is a fundamental right and privilege, fundamental in citizenship in a free republican government and common to all citizens of these United States on equal terms and

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22. Justice Harlan went on to conclude, *Civil Rights Cases*, supra, 36, that:

> ". . . I hold that since slavery, as the court has repeatedly declared, *Slaughter-House Cases*, 16 Wall. 36 [73 U.S. XVIII, 394]; *Strauder* v. *W. Va.*, 100 U.S. 303 [XXV, 664], was the moving or principal cause of the adoption of that [13th] Amendment, and since that institution rested wholly upon the inferiority as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belonged to free men of other races."

with equal treatment to each and every citizen without regard to race and color, for "the quality of the rights of citizens is a principle of republicanism". *U.S.* v. *Cruikshank*, 92 U.S. 542, 555 [XIII, 588]. Moreover, the "emphatic language of this Court is that 'one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the states.' "

As long as citizens of these United States can be denied equal treatment by exclusion solely by reason of their race or color from the purchase, ownership and enjoyment of property within suburban residential communities of the nature of Paddock Woods, these great constitutional purposes, fundamental to the very existence of a republican nation dedicated to the freedom and liberty and equality of all citizens in the exercise of their civil rights, will be mere idle words uttered by those dedicated to preserving this nation and hollow dreams of a Constitution intended to endure for generation to generation to preserve for all citizens freedom, liberty and equality.[23]

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23. In discussing the existence of a right without the opportunity and privilege to effectively exercise the same, J. Harlan, *Civil Rights Cases*, supra, 39, 40, discussed the same in the following language, which is analogous to the point made in this portion of the argument:

> " 'Personal liberty consists', says Blackstone, 'in the power of locomotion, of changing situation or removing one's person to whatever places one's own inclination may direct, without restraint, unless by due course of law.' But of what value is this right of locomotion, if it may be clogged by such burdens as Congress intended by the Act of 1875 to remove? They are burdens which lie at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is, in this land of universal liberty, a class which may still be discriminated against, even in respect of rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a free man is not only branded as one

Respondents' policy of exclusion which deprived petitioners the right to purchase, own and enjoy property within the suburban community which they developed violates both the letter and the spirit of the 13th Amendment, for it is a deprivation of the petitioners' fundamental civil rights and clearly by its effect and impact subjects them to a "species of servitude within the meaning of the Amendment", for the said amendment by its "reflex character" established and decreed universal civil and political freedom throughout the United States.[24]

Of the 13th Amendment the Court has said in *Clyatt* v. *United States*, 197 U.S. 207, 216, that:

"This amendment denounces a status or condition, irrespective of the manner or authority by which it is

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inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence; and all this solely because they belong to a particular race which the nation has liberated. 'The 13th Amendment alone obliterated the race line, so far as all rights fundamental in a state of freedom are concerned."

24. The impact and effect of discrimination solely by reason of race or color by depriving persons of the right to purchase, own and enjoy property within a residential suburban community as a whole, is not unlike that to which the Court addressed itself in *Brown et al.* v. *Board of Education of Topeka et al.*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R. 1180 (1954), wherein the Court stated at 347 U.S. 493, 494, that:

"Compulsory school attendance laws of the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, and preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. . . .

* * *

". . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

created. The prohibitions of the 14th and 15th Amendments are largely upon the acts of the state; but the 13th Amendment names no party or authority, but simply forbids slavery and involuntary servitude . . .

"The 13th Amendment does not permit the withholding or the deprivation of any right necessary inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude . . ." *Plessy* v. *Ferguson,* 163 U.S. 537, 555, 41 L.Ed. 256, 262 (1896).

Justice Harlan went on, in the last cited case, in his dissenting opinion to state that "in the view of the Constitution, in the eye of the law, there is no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, neither knows nor tolerates classes among citizens. In this end respect of civil rights, all citizens are equal before the law." Just as Justice Harlan saw it in the *Plessy* case, so in the instant case it would be regrettable if it should be concluded that it is competent for respondents to regulate and deny the enjoyment by petitioners of their civil rights solely upon the basis of race.

The "seeds of race hate" have been implanted throughout the Nation by a universal policy, notwithstanding the same be private as distinguished from public, of excluding and prohibiting Negroes from equal enjoyment of what might be appropriately termed the "New Society", the "suburban way of life", if you will, that has become the 20th Century way of life for the white race. "The destinies of the two races in this country are indissolubly linked together." What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust among the races than a universal policy of segregation in housing that proceeds on the ground that the colored

citizens are so inferior and degraded that they cannot be allowed to become integrated members of white communities, integrated members of the white suburban society. This policy of discrimination and segregation in housing notwithstanding the same may be the result of corporate and private policies "can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned." *Plessy* v. *Ferguson*, supra, 561, 264.

This whole issue involved in the instant case is not satisfactorily met "by the suggestion that social equality cannot exist between the white and black races in this country." Regardless of the elimination of race discrimination, and the final integration of races, there will undoubtedly remain discriminations founded upon economic class distinctions, the same as recognized by Justice Harlan in his dissent.[25] The arbitrary separation of citizens on the basis of race from white neighborhoods, white suburbs, the new white society "is a badge of servitude wholly inconsistent with the civil freedom . . . established by the Constitution. It cannot be justified upon any legal grounds."

It may well be true that slavery has disappeared from this Nation and that according to theory and the express law of the Land the race line has been obliterated from our systems of government and our free institutions have

25. "That argument, if it can properly be regarded as one, is scarcely worthy of consideration, for social equality no more exists between the two races when traveling in a passenger coach or public highway, than when members of the same race sit by each other in a streetcar or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of the city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting." *Plessy* v. *Ferguson*, supra, 561, 264; or, amici would continue, when they live within the same communities, neighborhoods or even side by side on the same block.

been placed upon the broad and sure foundation of the equality of all men before the law. Nevertheless, the erection and the creation of a de facto apartheid society by reason of a policy of discrimination and segregation in private subdivision housing by adherence and enforcement of real estate policies affecting large neighborhoods and even whole communities and incorporated municipalities of the metropolitan areas of this Nation, are wholly inconsistent with the civil freedom and personal liberty of its citizens. Such policies and their ultimate impact "interfere with the full enjoyment of the blessings of freedom . . . regulate civil rights, common to all citizens, upon the basis of race . . . [and perpetuate] a condition of legal [and economic and social] inferiority of a large body of American citizens, now constituting a part of the political community, called the people of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the constitution to each state of a republication form of government . . ." *Plessy* v. *Ferguson*, supra, 563, 564; 265. (Bracketed language added by author.)

CONCLUSION

Those, who would by discriminatory conduct and acts, which for American citizens in a free republic are but committed in sheer bigotry, and create for the Negroes in their urban ghettos de facto apartheid communities, are subjecting the Negroes to a status of inferiority and second-class citizenship cut off from the rest of society by curtains of discrimination. They are by such racially discriminatory policies affecting and perpetuating the badges and incidents of slavery and involuntary servitude. The "invidious scheme" to evade the results and implications of

the historical context within which the 13th, 14th and 15th Amendments were adopted and the jurisprudence that has followed, and to further perpetuate a segregated white society by the establishment of de facto apartheid communities cannot be permitted to stand under the test of freedom, liberty and equality universally established by these Amendments and as required in effecting their intent and design. The existence of such a scheme seems to stand in irreconcilable juxtaposition to all which was intended by these Amendments.

The hopelessness, frustration, hostility, outrage and deprivation created by social and economic deprivation and isolation are but the offspring of discrimination and segregation in residential housing—effected primarily by the establishment of racial exclusionary policies which permit the maintenance of residential suburban communities in which persons, such as petitioners herein, are denied the right to exercise their fundamental civil right of property ownership and enjoyment. Such segregation and discrimination must certainly be prohibited and eliminated by the 13th and 14th Amendments, for they are "clearly the roots of the whole syndrome of racism involved in the civil rights struggle."[26]

Amici do hereby petition this Court to permit the impoverished, the outcast, the deprived and hopeless to escape their ghettos to a stature of full and equal citizenship, immune from bigotry and racial discrimination; to

26. Address by Robert L. Carter, General Counsel, NAACP, Housing Conference, New York, June 29, 1965, as reported in "Affirmative Action to Achieve Integration", p. 28 (National Committee Against Discrimination in Housing, New York, N. Y.: 1966).

give those citizens deprived of a fundamental civil right the hope, freedom, liberty and equality intended by our forefathers who, acting through faith in the fundamentals of a democratic republic and in dedication to a belief in human dignity, adopted the 13th, 14th and 15th Amendments. The preservation of this republic from self-destruction, violence and disorder, and conceivably interracial civil war fermented in fear and hatred may well lie in the balance of justice with the decision of this Court on the issues here presented. The petitioners, and many other citizens similarly situated, see in this case hope for a society eroded by violence, disorder and racial discrimination; hope that the curtain of de facto enslavement may be shredded and the clouds of race hatred and fear dispersed, should the contentions made by petitioners and the supporting amici curiae be found persuasive and justified by the principles of a republican government, by the fundamental concepts of freedom, liberty and equality, and by law, reason and the universal sense of justice.

In these times of widespread civil disorder and criminal violence, much of which finds its birth in racial hatred, fear, resentment and degradation, times in which American lives have been lost at the hands of others acting in confusion and from frustration and hopelessness, and times in which valuable property has been wantonly destroyed, the words of warning spoken many years past seem particularly and ironically appropriate:

> ". . . The time will come when retaliation will be resorted to unless the government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various com-

munities and sections. It is not only necessary for the freed man, but it is important to the white people . . . that by plain and stringent laws, the United States should interpose and preserve peace and quiet in the community."[27]

Although we are merely two local governments which are a part of only one large metropolitan area of this Nation, amici are charged with the highest of public obligations and responsibilities—the duty to protect the health, morals, safety, prosperity and welfare of the community within which hundreds of thousands dwell and work all in the pursuit of life, liberty and happiness. These most treasured goals, natural to every man regardless of race and color or previous servitude, have remained frustrated by bigotry and the tyranny of the rich over the poor, the strong over the weak, of one race against another, by discriminations and segregation which have cut off citizens from and deprived them of their fundamental civil rights and the freedom and liberty to which they are entitled both as natural men and citizens of these United States. We now come before this Court, which is charged with preserving the "supreme law of the land" and the freedom, liberty and equality of all men, in support of the petitioners herein; we come in the defense of a cause—"the cause of . . . law against violence; mercy and tolerance against brutality and iron bound tyranny."

27. *United States* v. *Price et al.*, 383 U.S. 787, 809, 16 L.Ed. 2d 267, 281, 86 S.Ct. 1152; Remarks of Senator Poole of North Carolina on sponsoring Sections 5-7 of the Enforcement Act of 1870 (Cong. Globe, 41st Cong., 2d Sess., pp. 3611-3613).

For the reasons and pursuant to the authorities stated above, amici curiae pray the judgments below be reversed and the cause remanded for trial.

Respectfully submitted,

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